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No. 235

In the Supreme Court of the United States

OCTOBER TERM, 1969

RICARDO PEREZ GOITIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 409 F. 2d 524.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1969. Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to June 15, 1969, and on June 13 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 43, F.R. Crim. P., provides in pertinent part:

> In prosecutions for offenses not punishable by death, the defendant's voluntary absence after

the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. * * *

QUESTIONS PRESENTED

1. Whether the court erred in ordering petitioner's trial to continue in his absence after attempts to locate him had proved unsuccessful.

2. Whether petitioner was denied effective assistance of counsel at trial.

3. Whether the conviction should have been reversed because of the prosecutor's comments during summation to the effect that certain evidence was uncontradicted.

STATEMENT

A three-count indictment filed in the United States District Court for the District of Puerto Rico charged that petitioner unlawfully purchased and sold three ounces of heroin not pursuant to a written order form, in violation of 26 U.S.C. 4704(a) and 26 U.S.C. 4705 (a), and facilitated the transportation of the heroin, in violation of 21 U.S.C. 174. On February 23, 1968, he was sentenced to imprisonment for concurrent terms of thirty years and fined $10,000. The court of appeals affirmed (Pet. App. A).

Petitioner's trial was one of several initiated after intensive undercover investigations of Puerto Rico narcotics traffic early in 1967. A closely related case is *Rolon Marxuach* v. *United States,* 398 F. 2d 548 (C.A. 1), certiorari denied, 393 U.S. 982. As a result of the investigations, petitioner and others, including Rolon Marxuach, were arrested on July 17, 1967.

Petitioner immediately retained the services of Cesar Andreu Rebas, an experienced criminal lawyer (R. 25).[1] This counsel was later joined by another attorney with more than thirty years' experience, Benicio Sanchez Castano (R. 6–7).

Trials in the cases resulting from the undercover investigations were held in the late summer and early fall of 1967. As a result of incidents in related cases as well as the present one, the trial judge, Judge Boldt, came to believe that counsel were deliberately seeking to delay petitioner's trial. After earlier postponements and continuances, another motion for continuance was made on the date set for trial, October 2, on the ground that defense counsel were not prepared to proceed (R. 4, 10).[2] When Judge Boldt denied a continuance, both counsel requested to be relieved (R. 8–9). This request was denied (R. 10). The court then proceeded to examine prospective jurors, several of whom indicated that they were friendly with defense counsel (R. 11–19). One was a former client of Mr. Sanchez (R. 28). Neither counsel chose to question or challenge any of the jurors. Instead, they repeated their claim of unpreparedness (R. 29–30). Petitioner was personally asked by the court

[1] The record filed with the Clerk of this Court includes, *inter alia*, a copy of the indictment, transcripts of petitioner's trial and sentencing hearing, and a pertinent excerpt of the trial against Rolon Marxuach.

[2] The court noted that in three cases, including petitioner's, the same counsel had managed to find a physical disability or other health problem, which, they claimed, required a continuance (R. 8–9). A similar pattern of pre-trial conduct is described in *Rolon Marxuach* v. *United States*, *supra*, 398 F. 2d at 550.

whether he concurred in his attorneys' handling of the matter. He replied that he approved of their course of conduct (R. 30). After the jury was selected Judge Boldt continued trial to October 5, giving counsel three additional days to prepare (R. 25–26).

In the time between adjournment on October 2 and the reconvening of court three days later, Mr. Sanchez became ill and required hospitalization. When the court met on the morning of October 5, petitioner failed to appear. Mr. Andreu told the court that he had seen petitioner on the previous day, at which time petitioner stated that he desired to dismiss him as counsel and be represented only by Mr. Sanchez.[3] The judge ordered petitioner's bail revoked and issued a bench warrant for his apprehension (R. 41–42).[4] He then declared a recess.

The adjournment lasted until 8 p.m. on October 6. At that time the court was informed that the FBI had failed to locate petitioner (R. 61). Judge Boldt declared petitioner to be a voluntary absentee and invoked Rule 43, F.R. Crim. P., calling for trial to continue in petitioner's absence (R. 61). Mr. Andreu admitted that petitioner's whereabouts were unknown, and made no objection to the court's ruling (R. 61–

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[3] Rolon Marxuach made the same demand. 398 F. 2d at 550. During the continuance another defendant went to the hospital with a false claim of appendicitis, and an explosive device was found attached to the car belonging to the principal prosecution witness, agent Fortunato Jorge (398 F. 2d at 550).

[4] Petitioner was the third defendant in the series of narcotics cases to absent himself (R. 39). At petitioner's sentencing hearing, the Assistant United States Attorney related petitioner's statement to a marshal on October 4, 1967, that he would not appear for trial the next day (R. 109).

62). However, he commented that he was still not acquainted with petitioner's defense (R. 62). The court then appointed another experienced attorney, Stanley Feldstein, to assist Mr. Andreu (R. 149–151). The jury was called in and instructed that the trial would begin immediately, that the jurors should not speculate on petitioner's whereabouts, and that his absence from the courtroom was not to be taken into account in the jury's deliberations (R. 63).

The trial commenced with a brief opening statement by government counsel, essentially paraphrasing the wording of the indictment (A. 64–65). Mr. Andreu made no opening remarks. The jury was then told of two stipulations agreed to by counsel, to the effect that the substance which agent Jorge turned over to a chemist was found to be three ounces of heroin, and that the Treasury Department had not issued a written order blank to petitioner authorizing him to deal in narcotics (A. 66–69). Agent Jorge testified that on May 27, 1967, he provided an informer, Estoban Mendoza, with $3,600 to purchase narcotics; that at a parking lot in Carolina, Puerto Rico, he saw Mendoza give the money to petitioner and receive from him a package; that Mendoza immediately turned the unstamped package over to him; and that he in turn sent it to a chemist (R. 69–73). Defense counsel did not cross-examine Jorge. The package and its contents were admitted in evidence without objection, and the government rested. Mr. Andreu told the court that he had no evidence to introduce (R. 76). After counsel made a brief closing argument, the court asked Mr. Andreu whether he wished to make an argument. Mr.

Andreu declined to do so (R. 77). The court then gave its closing instructions, and the jury retired for its deliberations. A short time later the jury reported its verdict of guilty on all three counts (R. 89–91).[5]

ARGUMENT

1. The contention that it was reversible error to conduct the trial in petitioner's absence is without support in precedent on the facts of this case. The governing rule has long been that the voluntary absence of a defendant, once his trial has begun, does not nullify what has been done or prevent the completion of trial. *Diaz* v. *United States,* 223 U.S. 442, approving *Falk* v. *United States,* 15 App. D.C. 446 (C.A.D.C.), certiorari denied, 181 U.S. 618. The *Diaz* rule has been restated in Rule 43, F.R. Crim. P., and has uniformly been approved by the federal courts. See, *e.g., Cureton* v. *United States,* 396 F. 2d 671 (C.A.D.C.); *Cross* v. *United States,* 325 F. 2d 629, 631 (C.A.D.C.); *United States* v. *Bando,* 244 F. 2d 833, 846 (C.A. 2), certiorari denied, 355 U.S. 844; *Parker* v. *United States,* 184 F. 2d 488, 489–490 (C.A. 4); *United States* v. *Blount,* 339 F. 2d 331, 334–335 (C.A. 7); *Phillips* v. *United States,* 334 F. 2d 589, 591–592 (C.A. 9), certiorari denied, 379 U.S. 1002; *United States* v. *Vassalo,* 52 F. 2d 699, 700 (E.D. Mich.); *Brown* v. *State,* 372 P. 2d 785, 788–89 (S. Ct. Alaska 1962). The rule represents a reasonable judgment that the interest of criminal justice in prevent-

[5] Petitioner was apprehended in New York City on November 30, 1967, as he alighted from an airplane which had flown from Haiti (R. 109–110).

ing the "frustration of a trial in progress by the escape or absconding of the defendant" (*Cross* v. *United States, supra,* 325 F. 2d at 631) outweighs the right of the accused to confront witnesses and evidence against him where the accused, after participating in the initation of the trial, repudiates that right of confrontation by his own voluntary absence.

When petitioner did not appear for trial after the three-day recess, the trial judge made every reasonable effort to learn the reason for his absence and to locate him. Only after it became clear a day and a half later that petitioner's absence was deliberate and inexcusable did Judge Boldt decide to proceed with the trial. In the context of this case and the matters known to the trial judge regarding related cases, the decision to conduct the trial in petitioner's absence was a sound exercise of judicial discretion.

2. Mr. Andreu, a lawyer of wide experience in criminal matters who had represented petitioner in a prior case (R. 114), appeared as petitioner's counsel of record from the day of arrest. He prepared and submitted to the court a number of written motions prior to trial and as late as the morning of October 5 (R. 42-45, 50). Mr. Andreu was present with petitioner when the jury was selected. At no time before his departure did petitioner give the court any reason to believe that he was dissatisfied with Mr. Andreu's services. It was only after Mr. Sanchez became bedridden and was obviously unable to continue his role as assistant to Mr. Andreu that petitioner communicated to Mr. Andreu his desire to discharge him in favor of Mr. Sanchez. Petitioner never requested the

court to consent to the dismissal. This course of conduct was manifestly nothing more than another deliberate stalling tactic. With Mr. Andreu's vast experience, his prior familiarity with petitioner and his extensive participation in this case prior to trial, there is little doubt that he was competent to represent petitioner. Moreover, notwithstanding his own representations to the contrary, Mr. Andreu had ample time to prepare a defense.

Although his activity on petitioner's behalf before trial was brisk, once the trial began, Mr. Andreu evidently chose to be far less aggressive. Whatever the reasons for this change in strategy, it was shown to have met with petitioner's consent, as ascertained by the court after no questions or challenges had come forth from counsel during the selection of the jury. Consistent with this scheme were the facts that Mr. Andreu made no opening or closing statements and did not cross-examine the lone government witness.* Mr. Feldstein, the attorney appointed by the court as co-counsel, evidently approved this purposeful course; at least he made no effort to oppose it. In the context of this simple case, Mr. Andreu's representation of petitioner cannot be termed so ineffective that it was "shocking to the conscience of the court" and required reversal of petitioner's conviction. *Odom* v. *United States*, 377 F. 2d 853, 858–859 (C.A. 5); *Scott* v. *United States*, 334 F. 2d 72, 73 (C.A. 6), certiorari denied, 379 U.S. 842.

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*The court did, of course, instruct that the defense was not obliged to produce any evidence or disprove anything, and that the government had the burden to establish guilt (R. 84).

3. Petitioner's challenge to portions of government counsel's closing argument[7] was not made during the trial and cannot be first asserted on appeal from his conviction. *United States* v. *Socony-Vacuum Company*, 310 U.S. 150, 238–239; *United States* v. *Murphy*, 374 F. 2d 651 (C.A. 2), certiorari denied, 389 U.S. 836. In any event, the principle which prohibits comment upon a defendant's failure to testify does not forbid argument to the effect that the government's evidence is uncontradicted. *United States* v. *Edwards*, 366 F. 2d 853, 871 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908. A comment to that effect is particularly acceptable where, as here, the argument stresses the "sound affirmative case," unshaken by impeachment or cross-examination (*United States* v. *Giuliano*, 383 F. 2d 30, 34 (C.A. 3), certiorari denied, 389 U.S. 1055), and is followed by a court's instruction that the defendant is not required to testify, produce any evidence, or disprove anything, and the fact that he has not testified must be given no consideration whatsoever in the jury's deliberations. *Holden* v. *United States*, 388 F. 2d 240 (C.A. 1), certiorari denied, 393 U.S. 864; *United States* v. *Edwards*, *supra*; *United States* v. *Knox Coal Company*, 347 F. 2d 33 (C.A. 3), certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904; *United States* v. *Lyon*, 397 F. 2d 505 (C.A. 7), certiorari denied *sub nom. Lysczyk* v. *United States*, 393 U.S. 846; *Baker* v. *United States*, 115 F. 2d 533 (C.A. 8), certiorari denied, 312 U.S. 692; *Walsh* v. *United States*, 371 F. 2d 135 (C.A. 9), certiorari denied, 388 U.S. 915.

[7] The argument is reprinted in full at Pet. 11.

4. On June 2, 1969, this Court granted the petition for a writ of certiorari in *Minor* v. *United States,* No. 189, O.T., 1969, involving the effect of asserting the privilege against self-incrimination at a trial of a seller of narcotics without an order form. That same day the Court also agreed to hear a challenge to the validity of the provision in 21 U.S.C. 174 that proof of possession of narcotics is sufficient to authorize conviction unless the defendant explains his possession to the jury's satisfaction and of the presumption created by 26 U.S.C. 4704(a). *Turner* v. *United States,* No. 190, O.T., 1969. Accordingly, while it is questionable whether petitioner who did not timely assert the privilege against self-incrimination is entitled to rely thereon, the Court may deem it appropriate to defer action on this petition pending its decision in *Minor* and *Turner.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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